

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON THOMAS

CIVIL ACTION

v.

BEN VARNER, et al.

:  
:  
:  
:

NO. 02-4778

**O R D E R**

AND NOW, this                      day of                      , 2003,  
respondents' time for filing objections to the Report and  
Recommendation of Magistrate Charles B. Smith, granting an  
evidentiary hearing is extended to July 13, 2003.

BY THE COURT

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BRUCE W. KAUFFMAN  
United States District Court Judge

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**MOTION FOR ENLARGEMENT OF TIME**

LYNNE ABRAHAM, District Attorney of Philadelphia County,  
by HELEN KANE, Assistant District Attorney, and THOMAS W. DOLGENOS, Chief  
Federal Litigation, respectfully requests a 20-day enlargement of time in  
objections to the Report and Recommendation of Magistrate Charles B. Smith  
an evidentiary hearing in the above habeas corpus case and, in support thereof,

1. On May 31, 1994, a jury convicted petitioner of second degree murder  
related crimes for robbing and killing Harry James, the proprietor of a saloon  
the non-fatal shooting of Peter Fuller, a patron. Petitioner, who is currently  
sentence seeks habeas corpus relief alleging, inter alia, that his former counsel  
ineffective for not challenging the identification of shooting victim Peter Fuller.

2. On June 11, 2003, Magistrate Smith issued a Report and  
Recommendation which rejected certain of petitioner's claims but granted an  
hearing on petitioner's claim of ineffective for failing to file a motion for  
identification of Mr. Fuller. Specifically, the Court concluded that this was a  
specter of doubt," and therefore granted an evidentiary hearing to resolve the

underlying factual issues." Report and Recommendation, at 38.

2. Notwithstanding that the state court rejected petitioner's ineffective assistance, finding that trial counsel's strategy of eliciting testimony from Mr. Fuller failed to identify petitioner at the preliminary hearing, the state court's finding that the circumstances of Mr. Fuller's photographic identification was objectively unreasonable in order to undermine the reliability of Mr. Fuller's in-court identification of the man who shot him at close range, the Magistrate Judge has determined that the state court's finding is somewhat questionable because the state court did not hear testimony from the eyewitness and the detective who conducted the photographic array concerning the circumstances of Mr. Fuller's out of court identification of petitioner.

3. The Commonwealth believes that the Magistrate Judge's grant of an evidentiary hearing is erroneous primarily because it ignores that Wainwright v. Greenleaf, 466 U.S. 668 (1984), dictates that courts reviewing a claim of ineffective assistance of counsel must employ a strong presumption that trial counsel's performance falls within the wide range of reasonable professional assistance. Id. 466

4. The Magistrate Judge's grant of an evidentiary hearing to examine a possible alternative strategy further ignores the provisions of the Anti-Death Penalty Act (AEDPA), 28 U.S.C. § 2254, et seq., which governs federal habeas petition. Indeed, under § 2254(d) it is not enough to convince the federal court that, in its independent judgment, the state court decision applied the law incorrectly. Bell v. Cone, 122 S.Ct. 1843, 1852. The federal habeas statute places the primary responsibility with the state courts for these judgments, and authorizes federal court intervention only when a state court decision is unreasonable.

Visciotti, 123 S.Ct. 357, 361 (2002). Rather than focus on the reasonable state court's ruling in this regard, the Magistrate Judge's grant of an evidentiary hearing improperly proposes to explore the viability of the alternative strategy with the benefit of hindsight, has proposed.

5. The Commonwealth intends to set forth in a more comprehensive manner the nature of its objections to the grant of the evidentiary hearing but requests time to do so because the assigned attorney has only recently returned to a part-time basis following an extended medical absence for knee replacement surgery.

**WHEREFORE**, respondents request an additional 20 days - to July 13, 2003 - in which to file their objections to the Report and Recommendation of Magistrate Charles Smith granting an evidentiary hearing in the above habeas matter.

Respectfully submitted,

HELEN KANE  
Assistant District Attorney  
THOMAS W. DOLGENOS  
Chief, Federal Litigation

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**CERTIFICATE OF SERVICE**

I, HELEN KANE, hereby certify that on June 23, 2003, a copy of the foregoing pleading was served by placing same, first class postage prepaid, in a United States Mail addressed to:

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